

Department of Veterans Affairs

811.104-70

PART 811—DESCRIBING AGENCY NEEDS

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AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301-1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

811.001 Definitions.

For the purposes of this part:

Brand name product means a commercial product described by brand name and make or model number or other appropriate nomenclature by which the product is offered for sale to the public by the particular manufacturer, producer or distributor.

Salient characteristics means those particular characteristics that specifically describe the essential physical

and functional features of the material or service required. They are features that are identified in the specifications as a mandatory requirement that a proposed “equal” product or material must possess for the bid to be considered responsive.

Subpart 811.1—Selecting and Developing Requirements Documents

811.103 Market acceptance.

811.103-70 Technical industry standards.

Where items are required to conform to technical industry standards, such as those adopted by: Underwriters Laboratories, Inc.; Factory Mutual Laboratories; American Gas Association; American Society of Mechanical Engineers; National Electrical Manufacturers Association; American Society of Heating, Refrigerating and Air-Conditioning Engineers; or similar organizations, where such standards are generally recognized and accepted in the industry involved, the invitation for bids, request for proposals or request for quotations will so state. In no instance, where there is a multiple choice of laboratories, shall the invitation for bid, request for proposal, or request for quotation indicate that the label or certificate of only one such laboratory is acceptable. The contracting officer shall include the provision at 852.211-72, Technical industry standards, in solicitations requiring conformance to technical industry standards unless comparable provisions are contained in the item specification.

811.104 Use of brand name or equal purchase descriptions.

811.104-70 Brand name or equal purchase descriptions.

(a) The specification writer may use purchase descriptions that contain references to one or more brand name products only in accordance with 811.104-71 through 811.104-75.

(b) Purchase descriptions that contain references to one or more brand name products must be followed by the words “or equal,” except when the acquisition of a specific brand name is

fully justified under FAR Subpart 6.3 and 806.3. If more than one brand name is acceptable, the contracting officer should list the known acceptable brand name products in the solicitation.

(c) Where a “brand name or equal” purchase description is used, the contracting officer must give bidders an opportunity to offer products other than those specifically referenced by brand name. Following bid opening or receipt of offers, the contracting officer must determine if non-“brand name” substitute products fully meet the salient characteristics listed in the solicitation.

(d) When using a “brand name or equal” purchase description, the specification writer must set forth those salient physical, functional, or other characteristics of the referenced products that are essential to the minimum needs of the Government. For example, when interchangeability of parts is required, the specification writer must specify this requirement. The purchase description must contain the following information to the extent available:

(1) Complete common generic identification of the item required.

(2) Applicable model, make, or catalog number for each brand name product referenced and identity of the commercial catalog in which it appears.

(3) Name of manufacturer, producer, or distributor of each brand name product referenced (and address if not well known).

(4) Any other information necessary to describe the item required.

(e) When necessary to adequately describe the item required, the contracting officer may use an applicable commercial catalog description or pertinent extract if the description is identified in the solicitation as being that of the particular named manufacturer, producer, or distributor. The contracting officer must insure that a copy of any catalog referenced (except a parts catalog) is available on request for review by bidders at the purchasing office.

(f) Except as noted in paragraph (d) of this section, the specification writer must not include in a purchase description either minimum or maximum restrictive dimensions, weights, materials, or other salient characteristics

that are unique to a brand name product or that would tend to eliminate competition or other products that are only marginally outside the restrictions. However, the specification writer may include in a purchase description restrictive dimensions, weights, materials, or other salient characteristic if:

(1) The user determines in writing that the restrictions are essential to the Government's requirements;

(2) The specification writer includes the brand name of the product in the purchase description; and,

(3) The contracting officer makes all other determinations required by 811.105.

(g) The contracting officer must include in the contract file, as appropriate, written justifications for using the “brand name or equal” description, the contracting officer's determinations, and bidder submissions.

811.104-71 Purchase description clauses.

(a) When a solicitation uses “brand name or equal” purchase descriptions, the contracting officer must include in the solicitation the clause at 852.211-73, Brand name or equal, and the provision set forth at FAR 52.214-21, Descriptive Literature. The contracting officer must review the requirements at FAR 14.202-5 when using the descriptive literature provision.

(b) When a “brand name or equal” purchase description is included in an invitation for bids, the contracting officer shall insert the following after each item so described in the solicitation, for completion by the bidder:

Bidding on:

Manufacturer name _____

Brand _____

No. _____

811.104-72 Limited application of brand name or equal.

If the contracting officer determines that the clause at 852.211-73, Brand name or equal, applies to only certain line items of a solicitation, the requirements of 811.104-71(b) apply to those line items and the contracting officer must include a statement in the solicitation as follows:

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The clause entitled “Brand name or equal” applies only to the following line items: *[List the line items to which the clause applies]*

811.104-73 Bid samples.

(a) When a solicitation contains “brand name or equal” purchase descriptions, the contracting officer must not require a bidder who offers brand name products, including component parts, referenced in the descriptions to furnish bid samples of the referenced brand name products.

(b) A solicitation may require the submission of bid samples in the case of a bidder offering “or equal” products. If bid samples are required, the contracting officer must include in the solicitation the provision set forth at FAR 52.214-20, Bid Samples.

(c) A bidder must furnish all descriptive literature in accordance with and for the purpose set forth in the “Brand Name or Equal” clause, 852.211-73(c)(1) and (c)(2), even though bid samples may not be required.

811.104-74 Bid evaluation and award.

(a) A bid offering products that differ from brand name products referenced in a “brand name or equal” purchase description must be considered for award if the contracting officer determines in accordance with the terms of the clause at 852.211-73, Brand name or equal, that the offered products are clearly identified in the bid and are equal in all material respects to the products specified.

(b) In award documents, the contracting officer must include, or incorporate by reference, an identification of the specific products that the contractor is to furnish. The identification must include any brand name and make or model number, descriptive material, and any modifications of brand name products specified in the bid. This requirement also applies when the descriptions of the end items contain “brand name or equal” purchase descriptions of component parts or of accessories related to the end item, and the clause at 852.211-73, Brand name or equal, was applied to the component parts or accessories (see 811.104-72).

811.104-75 Procedure for negotiated procurements.

(a) The specification writer and contracting officer must use the policies and procedures prescribed in 811.104-70 through 811.104-74 as a guide in developing adequate purchase descriptions for negotiated procurements.

(b) The contracting officer may adapt the clause at 852.211-73, Brand name or equal, for use in negotiated procurements. When use of the clause is not practical (as may be the case in unusual and compelling urgency purchases), the contracting officer must inform suppliers that proposals offering products different from the products referenced by brand name will be considered if the contracting officer determines that the offered products are equal in all material respects to the products referenced. The contracting officer must place decisions under this paragraph in writing for the contract file, as appropriate.

811.105 Items peculiar to one manufacturer.

(a) Except as provided in paragraph (b) of this section, the specification writer must write specifications in accordance with FAR 11.002.

(b)(1) When the specification writer determines that a particular physical or functional characteristic of only one product will meet the minimum requirements of VA (see FAR 11.105) or that a “brand name or equal” purchase description must be used (see FAR 11.104), the specification writer must identify the item(s) for the contracting officer and do one of the following:

(i) Provide a full written justification of the reason the particular characteristic is essential to the Government’s requirements.

(ii) Explain why the “brand name or equal” purchase description is necessary.

(2) The contracting officer makes the final determination whether restrictive specifications or “brand name or equal” purchase descriptions will be included in the solicitation.

811.107 Contract clauses.

(a) Insert the clause at 852.211-70, Service data manuals, paragraph (a), in solicitations and requests for proposals

for technical medical and other technical equipment and devices issued by a field facility unless the facility Chief, Engineering Service, indicates that the service data manuals are not needed. The purpose of the clause is to require the manufacturer to provide VA a manual or groups of manuals that will allow for the in-house repair of the equipment purchased.

(b) Insert the clause at 852.211-70, Service data manuals, paragraph (b), in solicitations and requests for proposals for mechanical equipment (other than technical medical and other technical equipment and devices) issued by a field station.

Subpart 811.2—Using and Maintaining Requirements Documents

811.202 Maintenance of standardization documents.

(a) *Military and departmental specifications.* Contracting officers may, when it is advantageous to VA, use these specifications when procuring supplies and equipment costing less than the simplified acquisition threshold. When purchasing items of perishable subsistence, contracting officers may take into account only those exemptions set forth in paragraphs (b)(2) and (b)(3) of this section.

(b) *Nutrition and food service specifications.* (1) VA has adopted for use in the procurement of packinghouse products the purchase descriptions and specifications set forth in the Institutional Meat Purchase Specifications (IMPS) and the IMPS General Requirements, which have been developed by the U.S. Department of Agriculture. Purchase descriptions and specifications for dairy products, poultry, eggs, fresh and frozen fruits and vegetables, as well as certain packinghouse products selected from the IMPS especially for VA use, are contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, Publication No. C8900-SL.

(2) The military specifications for meat and meat products contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, must be used by VA only when purchasing such items of subsistence from

the Defense Logistics Agency (DLA). Military specifications for poultry, eggs, and egg products contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, may be used when purchasing either from DLA or from local dealers.

(3) Except as authorized in part 846, a contracting officer must not deviate from the specifications contained in Part IV of the Federal Supply Catalog, Stock List, FSC Group 89, Subsistence, and the IMPS without prior approval from the DSPE.

(4) Items of meat, cured pork and poultry purchased under the Subsistence Prime Vendor national contract or other local procurement sources should be purchased via Commercial Item Descriptions (CID) that require all products meet USDA Grading standards and/or the IMPS as applicable.

(c) *Department of Veterans Affairs specifications.* (1) The Director, Publications Staff, is responsible for developing, publishing, and distributing VA specifications covering printing and binding.

(2) VA specifications, as they are revised, are placed in stock in the VA Forms and Publications depot. The contracting officer may requisition facility requirements for these specifications from that source.

(d) *Government paper specification standards.* (1) Invitations for bids, requests for proposals, purchase orders, or other procurement instruments covering the purchase of paper stocks to be used in duplicating or printing, or which specify the paper stocks to be used in buying printing, binding, or duplicating, must require that the paper stocks be in accordance with the Government Paper Specification Standards issued by the Congressional Joint Committee on Printing.

(2) All binding or rebinding of books, magazines, pamphlets, newspapers, slip cases, and boxes must be procured in accordance with Government Printing Office (GPO) specifications and must be procured from the servicing GPO Regional Printing Procurement Office or, when appropriate, from commercial sources.

(3) There are three types of binding/rebinding: Class A (hard cover); Perfect

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(glued); and Lumbinding (sewn). The most suitable type of binding must be procured to satisfy the requirements, based upon the intended use of the bound material.

811.204 Contract clause.

Insert the clause at 852.211-75, Product specifications when product specifications are cited in an invitation for bids or a request for proposals.

Subpart 811.4—Delivery or Performance Schedules

811.404 Contract clause.

When delivery is required by or on a particular date for f.o.b. destination contracts, the contracting officer must add a statement following the Time of Delivery clause in FAR 52.211-8 that the delivery date specified is the date by which the shipment is to be delivered, not the shipping date. In f.o.b. origin contracts, the contracting officer must add a statement following this clause that the date specified is the date shipment is to be accepted by the carrier.

Subpart 811.5—Liquidated Damages

811.501 Policy.

The contracting officer must not routinely include a liquidated damages provision in supply or construction contracts, regardless of dollar amount. The decision to include liquidated damages provisions must conform to the criteria in FAR 11.501. In making this decision, the contracting officer must consider whether the necessity for timely delivery or performance as required in the contract schedule is so critical that a probable increase in contract price is justified. The contracting officer must not use a liquidated damages provision for any of the following reasons:

- (a) As insurance against selection of a non-responsible bidder.
- (b) As a substitute for efficient contract administration.
- (c) As a penalty for failure to perform on time.

811.503 Contract clause.

When the contracting officer determines that the Liquidated damages clause prescribed in FAR 52.211-11 or 52.211-12 must be used and where partial performance by the contractor may be to the advantage of the Government, the contracting officer must include the clause in 852.211-74, Liquidated damages, in the contract.

Subpart 811.6—Priorities and Allocations

811.602 General.

(a) Priorities and allocations of critical materials are controlled by the Department of Commerce. Essentially, priorities and allocations of critical materials are restricted to projects having a direct connection with supporting current defense needs. VA is not authorized to assign a priority rating to its purchase orders or contracts involving the acquisition or use of critical materials.

(b) When it has been technically established that it is not feasible to use a substitute material, the Department of Commerce has agreed to assist the VA in obtaining critical materials for maintenance and repair projects. The Department of Commerce will also, when possible, render assistance in connection with the purchase of new items, which may be in short supply because of their use in connection with the defense effort.

(c) A contracting officer having problems acquiring critical materials must ascertain all the facts necessary to enable the Department of Commerce to render assistance to VA in acquiring these materials. The contracting officer must submit a request for assistance to the DSPE containing the following information:

- (1) A description of the maintenance and repair project or the new item.
- (2) The critical material and the amount required.
- (3) The contractor's sources of supply, including any addresses. If the source is other than the manufacturer or producer, also list the name and address of the manufacturer or producer.
- (4) The VA contract or purchase order number.

(5) The contractor's purchase order number, if known, and the delivery time requirement as stated in the solicitation or offer.

(6) The additional time the contractor claims is necessary to deliver the materials if priority assistance is not provided.

(7) The nature and extent of the emergency that will be generated at the station, such as any of the following:

- (i) Damage to the physical plant.
- (ii) Impairment of the patient care program.
- (iii) Creation of safety hazards.
- (iv) Any other pertinent condition that could result because of failure to secure assistance in obtaining the critical materials.

(8) If applicable, a statement that the item required is for use in a construction contract that was authorized by the Director, Office of Construction and Facilities Management, to be awarded and administered by the facility contracting officer.

PART 812—ACQUISITION OF COMMERCIAL ITEMS

Subpart 812.1—Acquisition of Commercial Items—General

Sec.

812.102 Applicability.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

812.302 Tailoring of provisions and clauses for the acquisition of commercial items.

AUTHORITY: 38 U.S.C. 501; 40 U.S.C. 121(c); and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 812.1—Acquisition of Commercial Items—General

812.102 Applicability.

(a) This part shall be used for the acquisition of supplies and services that meet the definition of commercial items at FAR 2.101.

(b) Contracting officers shall use the policies in this part in conjunction with the policies and procedures for the solicitation, evaluation, and award prescribed in Parts 813, Simplified Acquisition Procedures, 814, Sealed Bidding, and 815, Contracting by Negotiation, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial items are subject to the policies of other parts of this chapter. When a policy in another part of this chapter differs from a policy in this part, this Part 812 applies to the acquisition of commercial items.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

(a) Regardless of provisions in other parts of the VAAR, contracting officers may use, as appropriate, only those provisions and clauses referred to in this part when acquiring commercial items.

(b) Contracting officers may use the provisions and clauses in the following VAAR sections, as appropriate and in accordance with the prescriptions for the provisions and clauses, in requests for quotations, solicitations, and contracts:

- (1) 852.203–70, Commercial advertising.
- (2) 852.203–71, Display of Department of Veterans Affairs Hotline poster.
- (3) 852.207–70, Report of employment under commercial activities.
- (4) 852.209–70, Organizational conflicts of interest.
- (5) 852.211–71, Special notice.
- (6) 852.211–72, Technical industry standards.
- (7) 852.211–73, Brand name or equal.
- (8) 852.211–75, Product specifications.
- (9) 852.214–70, Caution to bidders—bid envelopes.
- (10) 852.214–71, Restrictions on alternate item(s).
- (11) 852.214–72, Alternate item(s).
- (12) 852.214–73, Alternate packaging and packing.
- (13) 852.214–74, Bid samples.